JUDGMENT : His Honour Judge Humphrey LLoyd QC Official Referees' Business : 21 May 1998

1) The plaintiff, Cegelec, is the main contractor to London Underground Ltd (LUL) for the design, manufacture, installation and commissioning of the power, cabling and conductor rail system for the project to extend the Jubilee Line. The main contract which was dated 1 November 1993 was apparently assigned on 9 May 1994 by GEC Alsthom T & D Electronic Systems Ltd to Cegelec. (The assignment is not admitted but no point at present arises on this.) The defendant, Pirelli, is sub-contractor to Cegelec for the design, supply and installation of cabling systems. The sub-contract was made in November 1994. The price was £19 million. Completion is expected this year. Disputes have arisen between Pirelli and Cegelec. The sub-contract contains an arbitration agreement (to which I shall refer). Pirelli gave notice of arbitration on 26 September 1997 and on 20 November 1997 the President of the IEE appointed Mr Robert Gaitskell QC as arbitrator. Cegelec however contended that any such appointment was premature since, amongst other things, it maintained that before notice of arbitration can be given under the sub-contract disputes have first to be submitted in accordance with the dispute resolution procedure under the main contract with LUL. (It also considered that Pirelli's notice was insufficient.) Accordingly it commenced this action on 14 November 1997 (just prior to Pirelli's request to the IEE to appoint an arbitrator) in order to obtain the following relief:

"1. A declaration that on a true construction of the Sub-Contract the obligations set out in Clause 94 of the Contract are incorporated into the Sub-Contract.

2. A declaration that before any dispute is referred by the Defendant to arbitration it must be referred to the Plaintiff for his decision in writing and referred to conciliation under the Conciliation Procedure."

2) Pirelli rejected those claims and in its defence pleaded:

"9. On a true construction of the Sub-Contract:

(i) If any dispute arises between the Plaintiff and the Defendant at any time which cannot be settled amicably, it is to be referred to an arbitrator appointed in accordance with Clause 19, subject to the provisions of Clause 20.

(ii) No obligations under Clause 94 of the Contract are incorporated into the Sub-contract.

(iii) The Defendant is not obliged to refer a dispute to the Plaintiff for its decision or to refer the dispute to a conciliation process before referring the same to arbitration."

3) Pirelli then counterclaimed:

"2. A declaration that on a true construction of the Sub-Contract the Defendant is entitled to refer disputes which have arisen between the Plaintiff and the Defendant and which cannot be settled amicably to arbitration in accordance with Clause 19 of the Sub-Contract.

3. A declaration that on a true construction of the Sub-Contract the Defendant is not obliged to refer any such disputes to the Plaintiff for its decision in writing or to refer any such disputes to a conciliation process before referring the same to arbitration.

4. A declaration that on a true construction of the Sub-Contract Clause 94 of the Contract is not incorporated in the Sub-Contract.

5. A declaration that on a true construction of the Sub-Contract Clause 94 of the Contract does not apply to the Sub-Contract as if the Contractor were the Employer and the Sub-Contractor were the Contractor.

6. A declaration that on a true construction of the Sub-Contract the Defendant is not bound by any of the obligations under Clause 94 of the Contract."

4) Pirelli also decided to bring these questions to a head by issuing a summons under RSC Order 14A seeking orders in forms of its proposed declarations. I now deal with that summons. The arbitration is on ice pending its outcome for, although as a result of the Arbitration Act 1996 the arbitrator could now deal with the question of his substantive jurisdiction (as defined in section 82(1) and as provided by section 30), Pirelli is still entitled to seek declarations as to its rights and the court can decide such questions of jurisdiction.

5) The arbitration agreement in the sub-contract is contained in two clauses:

"19. ARBITRATION

4. Subject to the provisions of Clause 20 below if at any time any dispute shall arise between the CONTRACTOR and the SUB-CONTRACTOR which cannot be settled amicably either party shall give to the other notice of such dispute and the same shall be referred to the arbitration of a person to be agreed by the parties or failing agreement within 30 days of such notice the arbitration shall be conducted by a person appointed by the President of the Institute of Electrical Engineers.

20. JOINED ARBITRATION

5. In the event that any dispute or difference between the CONTRACTOR and the SUB-CONTRACTOR arising at any time before the completion by the CONTRACTOR of all obligations under the CONTRACT or the termination thereof shall be substantially the same as a matter which is a dispute or difference between the CONTRACTOR and the EMPLOYER which has been submitted to arbitration under the CONTRACT the CONTRACTOR shall be entitled to require the SUB-CONTRACTOR to be joined as a party to such arbitration. The SUB-CONTRACTOR hereby agrees to be so joined and that such dispute or difference with the CONTRACTOR shall be referred to the arbitrator appointed or to be appointed pursuant to the provisions of the CONTRACT. "

6) The sub-contract also contains the following provisions relevant to Cegelec's case:

In the definitions clause: *"The EMPLOYER" having the meaning defined to it in the recital to this AGREEMENT shall also include the expressions "Engineer" and "Engineer's Representative" if referred to in the CONTRACT."*

7) In clause 3:

"CONTRACT

"3. 1 The CONTRACT (particulars of which are set out in the FIRST SCHEDULE hereto) shall be incorporated in this AGREEMENT and as between the CONTRACTOR and the SUB-CONTRACTOR shall apply to the SUBCONTRACT WORKS as it applies to the Works except where amended by the SUB-CONTRACT."

3.2. Unless the context otherwise requires the CONTRACT shall apply to the SUB-CONTRACT as if the CONTRACTOR were the EMPLOYER therein stated and the SUB-CONTRACTOR were the CONTRACTOR thereunder."

8) Clause 6:

"COMPLETION

The SUB-CONTRACTOR shall complete the SUB-CONTRACT WORKS within the time for completion thereof specified in the FIFTH SCHEDULE hereto (SUB-CONTRACT PROGRAMME). If by reason of any circumstance which entitles the CONTRACTOR to an extension of the time for completion of the WORKS under the CONTRACT or by reason of the ordering of any variation to the SUB-CONTRACT WORKS or by reason of any breach by the CONTRACTOR the SUB-CONTRACTOR shall be delayed in the execution of the SUB-CONTRACT WORKS then in any such case provided the SUB-CONTRACTOR shall have given without undue delay written notice to the CONTRACTOR of the circumstances giving rise to delay the time for completion of the SUB-CONTRACT WORKS hereunder shall be extended by such period as may in all circumstances be justified. The SUB-CONTRACTOR shall in all cases take such action as may be reasonable for minimising or mitigating the consequences of any such delay.

9) Clause 8:

INSTRUCTIONS/DECISIONS

8.1 The SUB-CONTRACTOR shall comply with all instructions and decisions of the EMPLOYER which are notified to the SUB-CONTRACTOR by the EMPLOYER whether or not such instructions and decisions have been confirmed in writing to the SUB-CONTRACTOR by the CONTRACTOR. In the event the SUB-CONTRACTOR receives an instruction or decision from the EMPLOYER which has not been confirmed in writing to the SUB-CONTRACTOR by the CONTRACTOR, the SUB-CONTRACTOR shall complete and pass to the CONTRACTOR a 'Notification of Instruction' form promptly.

8.2 The CONTRACTOR shall have the same powers to give instructions and decisions to the SUB-CONTRACTOR in relation to the SUB-CONTRACT WORKS as the EMPLOYER has in relation to the WORKS under the CONTRACT and the SUB-CONTRACTOR shall comply with all such instructions and decisions. The powers of the CONTRACTOR under this Clause may be exercised by the CONTRACTOR whether or not the EMPLOYER has given instructions and decisions to the CONTRACTOR in relation thereto under the CONTRACT.

8.3 The value of the work carried out by the SUB-CONTRACTOR in complying with any instructions or decisions under Clauses 8.1 and 8.2 above shall be added to the SUB-CONTRACT PRICE provided that such work was not caused or contributed to by any act or omission by or any breach of contract by the SUB-CONTRACTOR."

10) Cegelec primarily rely on the incorporation of part of Clause 94 of the main contract conditions which are LUL's standard E & M conditions. This reads in full:

Settlement of Disputes

94.1 If any dispute of any kind whatsoever arises between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works including any dispute as to any decision, opinion, instruction, direction, certificate or valuation of the Engineer (whether during the progress of the Works or after their completion and whether before or after the determination, abandonment or breach of the Contract) it shall be referred to and settled by the Engineer who shall state his decision in writing and give notice of the same to the Employer and the Contractor. Unless the Contract shall have been already determined or abandoned, the Contractor shall in every case continue to proceed with the Works with all due diligence and he shall give effect forthwith to every such decision of the Engineer. Such decisions shall be final and binding upon the Contractor and the Employer unless and until as hereinafter provided either:

a) the recommendation of a conciliator has become final and binding upon the Contractor and the Employer; or

b) the decision of the Engineer is revised:-

(i) by an Official Referee or other person sitting as an arbitrator; or

(ii) by a judge sitting in London dealing with Official Referee's Business.

94.2 a) If the Engineer shall fail to give such decision for a period of 3 months after being requested to do so or if either the Employer or the Contractor is dissatisfied with any such decision of the Engineer, then and in any such case either the Employer or the Contractor may within 3 months after receiving notice of such decision or within 3 months after the expiration of the said period of 3 months (as the case may be) give notice in writing (hereinafter called a "Notice to Refer") to the other requiring the dispute to be considered under the London Underground Conciliation Procedure (1991) (a copy of which is annexed hereto at Appendix D) and the dispute shall thereafter be referred and considered in accordance with the said Conciliation

Procedure unless, where the Contractor has given Notice to Refer, the Employer shall within one month after receipt of such Notice to Refer give notice in writing to the Contractor that he intends to treat the Notice to Refer as Notice of Arbitration under Clause 94.3 in which event the dispute shall be deemed to have been referred and shall be referred to arbitration in accordance with Clause 94.3.

b) In the event that the Engineer shall have failed to give his decision within a period of 3 months after being requested to do so and neither the Employer nor the Contractor has given a Notice to Refer, the Engineer shall be deemed for the purpose of this Clause to have given a decision rejecting the claim the subject of the dispute and such decision shall be deemed to have been given on the last day of the 3 month period allowed under this Clause 94.2 for giving such a decision.

94.3 If the conciliator shall fail to make a recommendation within a period of 3 months of the Notice to Refer or if either the Employer or the Contractor is dissatisfied with the conciliator's recommendation, then and in either case either party may within one month after the expiration of the said period of 3 months or within one month after receipt of the conciliator's recommendation (as the case may be) give notice in writing (herein called a "Notice of Arbitration") to the other requiring the dispute to be referred to the arbitration of an Official Referee pursuant to Section 11 of the Arbitration Act 1950. In the event that neither party gives Notice of Arbitration within one month after receipt of the conciliator's recommendation the recommendation shall be deemed to have become final and binding upon the Contractor and the Employer.

94.4 No steps shall be taken in any reference to arbitration under Clause 94.3 until after actual or alleged completion of the whole of the Work or forfeiture or alleged forfeiture of the Contract pursuant to Clause 92.1 or termination or alleged termination of the Contract pursuant to any other Clause of these Conditions of Contract provided that the giving of a Certificate of Completion under Clause 72.1 shall not be a condition precedent to the taking of any step in such reference. The arbitration shall be held in London and the award of the Official Referee shall be final and binding upon the Contractor and the Employer. In relation to any such reference:

a) the Official Referee sitting as an arbitrator shall have full power to open up, review and revise any decision, opinion, instruction, direction, certificate or valuation of the Engineer;

b) neither party shall be limited in the proceedings before the Official Referee to the evidence or arguments put before the Engineer or any conciliator appointed pursuant to Clause 94.2;

c) no decision given by the Engineer shall disqualify him from being called as a witness and giving evidence before the Official Referee on any matter whatsoever relevant to the dispute the subject of the reference.

94.5 If for any reason no Official Referee is willing to accept the appointment as arbitrator, either party may give notice in writing to the other requiring the dispute to be referred to and tried by a judge sitting in London dealing with Official Referees' Business. Either party may commence proceedings in the High Court by writ or originating summons (as the case may be) issued out of the Official Referees' Registry of the Queen's Bench Division of the High Court provided that no writ nor originating summons shall be issued prior to the actual or alleged completion of the whole of the Works or forfeiture or alleged termination of the Contract pursuant to any other Clause of these Conditions of Contract.

6. In relation to any such proceedings:

a) the Official Referee shall have and the parties hereby agree that he shall be vested with full power to open up, review and revise any decision, opinion, instruction, direction, certificate or valuation of the Engineer;

b) neither party shall be limited in the proceedings before the Official Referee to the evidence or arguments put before the Engineer or any conciliator appointed pursuant to Clause 94.2;

c) no decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the Official Referee on any matter whatsoever relevant to the dispute the subject of the proceedings.

94.6 If for any reason the Official Referee shall not accept or not have the powers referred to in Clause 94.5 a), any matters in issue in respect of which the Official Referee shall not have jurisdiction shall be deemed to have been referred by the Notice of Arbitration in Clause 94.3 and shall be referred to the arbitration of a person to be agreed failing which to be appointed by the President of the Institution of Mechanical Engineers."

11) The London Underground Conciliation Procedure (1991) which is referred to in clause 94.2 provides that conciliation may be terminated at any time by a party giving a notice of arbitration under clause 94.3.

Pirelli's Submissions

12) Mr Elliott's submissions were relatively simple. The issues raised by the summons required the ascertainment of the intention of the parties. That was to be derived from the wording used (***Pioneer Shipping Ltd v. BTP Tioxide Ltd*** [1982] AC 724 at page 736B) and was to be judged objectively (***Reardon-Smith Ltd v Hansen Tangen*** [1976] 1 WLR 989 at page 996E). Clause 19 of the sub-contract set out the parties' agreement for the resolution of disputes and it was not necessary to go beyond it. Cegelec's attempt to bring in clause 94 of the main contract was misconceived. Cegelec sought to do so by using, first, clause 3.1 but that only applied to the Sub-Contract Works and then only *"except where amended by the Sub-Contract"* and, secondly, clause 3.2 whereby the main contract applied to the sub-contract but with *"Contractor"* substituted for *"Employer"* and *"Sub-Contract"* for *"Contract"*, but that was also wrong since there should be no such changes *"if the context otherwise requires"*, and the clauses 19 and 20 of the sub-contract did so require.

13) Mr Elliott argued that furthermore clause 94 of the main contract conflicted with clause 19 of the sub-contract since the latter provided for the parties to refer a dispute to arbitration **at any time**, whereas the incorporation of clause 94 would prevent that happening and would at least postpone the commencement of an arbitration until the dispute had been referred to the Engineer, except that if clause 94 was to be rewritten by clauses 1 and 3.2 of the sub-contract (as Cegelec contended) then the dispute would be referred to the Contractor who would then decide a dispute between himself and the Sub-Contractor which, if it were the same as a dispute between the Contractor and LUL, would also be decided by the Engineer. The Contractor would have to notify himself of his own determination. If the Sub-Contractor were to dispute a claim made by the Contractor and if it were referred to the Contractor but if by inadvertence the Contractor failed to decide it the Contractor would under clause 92.2(b) be deemed to have rejected his own claim and the resulting rejection of that claim would be binding on him. In addition therefore to postponing the start of the arbitration Cegelec's interpretation produced unreal and absurd results which showed that it could not be presumed to be the parties' intention. Finally, if clause 94 applied no arbitrator could be appointed until some conciliation procedure had been completed or terminated (assuming that LUL's procedure could be made to fit.) .

14) Mr Elliott argued that the possible incorporation of clause 94 should not be approached on the same basis as if it were the incorporation of an arbitration clause since Cegelec did not seek to incorporate all the provisions of the main contract but only parts of clause 94 and then wished to modify clause 19 to conform to the main contract. Cases such as ***Thomas v Portsea Steamship Co Ltd*** [1912] AC 1, or ***The "Annefield"*** [1971] P. 168, or the recent cases of ***Aughton Ltd v MF Kent Services Ltd*** (1991) 57 BLR 1, ***Giffen (Electrical Contractors) Ltd v Drake & Scull Engineering Ltd*** (1993) 37 Con LR 84 and ***Roche Products Ltd v Freeman Process Systems Ltd*** (1996) 80 BLR 110, although of value where the issue was one of incorporation where no provision existed, were of no direct assistance since the question was whether the arbitration clause in the sub-contract should be **modified** by grafting on the main contract preliminary procedures. Nevertheless His Honour Judge Hicks QC had set out the correct approach in ***Roche*** where he had said at page 114: *"Acceptance of a test of intention, and rejection of any requirement that the presence or absence of particular formulae be determinative, do not preclude a recognition that some types of provision may require clearer or stronger evidence than others before an intention to include them may be inferred. That may be because they are particularly onerous or unusual or for some other reason. I find some difficulty, for myself, in regarding arbitration provisions as onerous or unusual in a construction contract, but they are certainly to be distinguished in another way. Although commonly called arbitration "clauses" they are not ordinary first-order terms of the contract, regulating the parties' substantive rights and obligations under it, but second-order terms about the contract and in particular about the resolution of disputes in relation to it. In that sense they are contracts in their own right with an independent existence. Thus they may survive the discharge of the underlying contract and indeed govern disputes as to whether it has been discharged and if so how and with what consequences. It is therefore right that clear evidence of the intention to incorporate them should be needed, and that in particular caution should be exercised where the incorporation relied upon is not specific to the subject contract but arises by reference to another contract, for then there may be good ground for questioning whether the incorporation of the substantive provisions of that other contract was intended to carry the separate contract between the parties to it as to how disputes between them under it should be resolved. Moreover there may be difficulty in "transplanting" the arbitration clause in such a way as to be workable in a different context."*

15) Mr Elliott submitted that the well-known observations of Buckley L.J. in ***Modern Buildings Wales Ltd v. Limmer and Trinidad Ltd*** [1975] 1 WLR 1281 at page 1289 should be followed: *"... Where parties by an agreement import the terms of some other document as part of their agreement those terms must be imported in their entirety, in my judgment, but subject to this: that if any of the imported terms in any way conflict with the expressly agreed terms, the latter must prevail over what would otherwise be imported. ..."*

16) In ***Lewison: the Interpretation of Contracts,*** 2nd ed at para 2.06 the author says: *"The terms of the clauses which are incorporated into the parties' contract may not always be entirely appropriate to the contract into which they are incorporated. The proper approach to construing an incorporated document was laid down by the House of Lords in **Thomas (T.W.) & Co Ltd v. Portsea Steamship Co Ltd,** and by the Court of Appeal in **Hamilton & Co v. Mackie & Sons.** In the latter case, Lord Esher M.R. took the approach of reading in the whole terms of the incorporated document, and then treating any term which was inconsistent with the incorporating document as insensible and to be disregarded. In the former case Lord Gorell and Lord Robson approached the matter from the standpoint of reading in so much of the incorporated document as is not inconsistent with the subject-matter of the incorporating document. The two approaches may differ slightly but they achieve the same result. The process was described by Buckley L.J. in **Modern Buildings Wales Ltd v. Limmer and Trinidad Ltd** as follows...":*

17) Mr Elliott referred to ***Tillmans & Co v SS Knutsford Ltd*** [1908] 2 KB 385 at page 402; ***Schuler v Wickman Machine Tool Sales Ltd*** [1974] AC 235 at pages 251E and 255H; and para 6.13 of ***Lewison: the Interpretation of Contracts,*** in support of the general proposition that Cegelec's construction should not be accepted as it was absurd, futile and unreasonable. The passages relied on are conveniently discussed by Mr Lewison in paragraph 6.13 of his book:

"THE REASONABLENESS OF THE RESULT

The reasonableness of the result of any particular construction is a relevant consideration in choosing between rival constructions.

*In **Tillmans & Co v. S.S. Knutsford Ltd,** Farwell L.J. said: "In a mercantile document or a statute there is a presumption that business men do not intend to do anything absurd, which is some slight guide; but in all cases it is a matter of construction."*

Similarly, in ***Schuler (L.) A.G. v. Wickman Machine Tool Sales Ltd,*** Lord Morris of Borth-y-Gest said: *"Subject to any legal requirements, businessmen are free to make what contracts they choose but unless the terms of their agreement are clear a court will not be disposed to accept that they have agreed something utterly fantastic."*

However, this approach goes further than might appear from the use of the words *"absurd"* and *"utterly fantastic".* In the latter case Lord Reid put the point more neutrally, saying: *"The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."*

Clearly, this is allied to the attitude of the court in discerning (or attempting to discern) the commercial purpose of a particular transaction, and construing the contract in the light of that commercial purpose. This attitude has grown markedly in recent years, and is perhaps the single most important change in the construction of all classes of written instrument this century. The epitome of this approach is to be found in the following observation of Lord Diplock in ***The Antaios:*** *"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."*

The subject of business common sense and the commercial purpose of contracts is dealt with in paras. 1.06 and 1.07.

7. However, the court is not able to disregard clear words. In ***Glofield Properties Ltd v. Morley (No.2)*** Nourse L.J. said: *"... the question is whether [the judge] was also correct in deciding that the parties have clearly and unequivocally expressed an intention in the sense for which the plaintiff contends. If they have not, it is open to the court to construe their language in such a way as to produce the more sensible and realistic commercial result."*

Similarly, in ***Laura Investment Co Ltd v. Havering London Borough Council*** Hoffman J. said of a construction of a lease for which the landlord contended: *"This would be an uncommercial thing to do. It might be the consequence of the express language of the lease or the clear presumption of construction ... In a question such as this, however, where one has to deduce the intention of the parties from all the circumstances ... I think one is free to assume that they intended a fair and commercial result rather than a unfair one."*

18) Mr Elliott submitted that the last quoted dicta of Hoffman J provided a useful modern guide.

Cegelec's Submissions

19) Mr Vivian Ramsey QC and Mr David Streatfeild-James for the plaintiff started from a different position since they first contended that clauses 3.1 and 3.2 were effective to incorporate requirements that before initiating arbitration under clause 19 of the sub-contract (a) any dispute had to be submitted to Cegelec for its decision and (b) there had to be a reference of the dispute then resulting to a conciliator.

20) They submitted that in approaching the question of incorporation the principles to be applied were the same as those which applied in determining whether another alternative dispute resolution procedure - arbitration - was to be presumed to have been agreed by the parties even though it was not specifically referred to. The test was one of the presumed intention of the partes (as set out by Judge Hicks QC in ***Roche*** at pages 113-114 and 123). Reference was also as to section 6(2) of the Arbitration Act 1996 which had been based on Article 7 of the UNCITRAL Model Law. That article was considered by Kaplan J in ***Astel Peiniger Joint Venture v Argos Engineering & Heavy Industries Ltd*** [1994] 3 HKC 328. He concluded that presumed intention was the test. He referred to ***Thomas v Portsea, The" Annefield", Aughton v Kent*** and ***Giffen v Drake & Scull*** (amongst others) and said that since ***Thomas v Portsea*** did not apply in Hong Kong (as Article 7 of the Model Law applied): *"The task before the court in determining whether or not there has been incorporation by reference is one of construction, namely, to ascertain the parties' intentions when they entered into the contract by reference to the words that they used."*

21) Secondly, counsel said that clause 3.2 was enough on its own to incorporate clause 94. The clause identified modifications that might be required. For example clause 1 defined *"Employer"* as including the expression *"Engineer"* and so since under clause 3.2 the "Employer" was to be treated as the *"Contractor"*, for the purposes of applying the main contract to the Sub-Contract, the "Contractor" assumed the position of the *"Engineer"* vis-avis the *"Sub-Contractor*" who in turn became the *"Contractor".* Clause 94 was thus workable as between Cegelec and Pirelli.

22) Thirdly, Cegelec argued that its construction of the sub-contract did not conflict with two general principles. First, that the terms to be imported are imported in their entirety except to the extent that they conflicted with express terms: see ***Thomas v Portsea*** and ***Modern Buildings v Limmer and Trinidad.*** Secondly, there was no rule of construction which required that only clauses "*directly germane"* should be incorporated into a sub-contract: *Miramar Corporation v Holborn Oil* [1984] 1 AC 676. These two principles were reflected in the words *"unless the context otherwise requires".* Hence Cegelec did not contend that clauses 94.5 and 94.6 were transported into the sub-contract for they conflicted with clauses 19 and 20 and these clauses were the context which required otherwise. However clauses 94.3 and 94.4 were to be incorporated since in clause 94.3 in place of arbitration by an Official Referee the arbitrator would, in the absence of agreement, be appointed by the President of the IEE

(as provided by clause 19 of the sub-contract) and clause 94.4 would apply in its entirety substituting *"arbitrator"* for *"Official Referee"*.

23) Fourthly, Pirelli was wrong to suggest that Cegelec's construction deprived it of an immediate right to arbitration. Only *"disputes ... which cannot be settled amicably"* could be referred to arbitration. The effect of the incorporation was to define what was meant by *"settled amicably"*, namely to see if a decision or the recommendations of a conciliator could achieve a resolution of the dispute by amicable agreement. The LUL Conciliation Procedure stated that it was "*intended to assist the parties reach an equitable settlement of the dispute."*

24) Mr Ramsey also advanced a further new argument to the effect that as a result of clause 3.2 Cegelec had the power to give decisions under clause 94.1 (as if the Engineer) and Pirelli was in any event bound under clause 8.2 to comply with such decisions of the contractor.

Pirelli's Reply

25) Mr Elliott reiterated points made in his opening and emphasised that clause 3.2, like clause 3.1, was intended to place Cegelec in a "back to back" situation as regards the works themselves. If Cegelec were right then all the provisions of the main contract applied so that prima facie the Sub-contractor would be entitled to start when Cegelec was to start and to finish when Cegelec were due to finish. Clearly clause 6 of the sub-contract took precedence as a matter of straightforward interpretation, although clause 6 prevailed either because the context required otherwise or because clause 6 "amended" the main contract. Clause 8.2 covered the usual types of instructions or decisions that had to be given in relation to the works. This was borne out by clause 8.3 which provided for their valuation. Decisions under clause 94 did not lead to valuations under clause 8.3. Amicable settlement as provided by clause 19 was not a decision under clause 94 nor the recommendation of a conciliator.

Decision

26) The arguments of each party seem to show at least that Lewison is not right to say in paragraph 2.06 that "The two approaches [to incorporation] may differ slightly but they achieve the same result" since there is evidently a marked difference between Cegelec's approach (ie to start with the words of incorporation in clause 3 and to treat them as controlling the remainder of the sub-contract) and Pirelli's approach (which is to look at the sub-contract in its entirety with no such presumption). The overriding objective is of course the ascertainment of the parties' presumed intentions from the words that they used. From the cases cited the observations of Sir Thomas Bingham MR in ***Giffen v Drake & Scull*** are perhaps as apt as any:

"...the task that the court has to perform is one of construction. Any process of construction is to be begun by looking at the words that the parties have actually used in order to ascertain what their intention was. It is, of course, well known that the context in which particular words are used may be of great importance with the result that language, taken out of context and construed on its own, may appear to have one meaning, but assumes a different meaning when it is read in the context of a complete contractual document. It is also, of course, familiar to anyone concerned with construing documents that the nature of the transaction may be of relevance.

8. Thus, one finds in the authorities that significance is sometimes attached to the fact that a document is a negotiable instrument, which conditions the mind of the court in trying to discern what meaning the parties intended a provision to have, whereas here the question is whether the parties to one contract intended to incorporate in their contract a term from another contract. It is relevant, particularly in the absence of clear and express language, to see how apt and workable the term in question would be if it were so transplanted.

9. From all this it follows that we have to look very closely at the particular language of the provisions that we have to construe and the particular circumstances of the contract in question. Unless clear rules have been laid down - and they sometimes have been - for example, as to the meaning to be given to the expression 'condition' in the context of charterparty and a bill of lading, one has, I think to be cautious in reasoning from one case to another since cases appear to turn very much on their own particular terms and their own particular facts."

27) If the parties' intentions are to be found in the particular wording of the sub-contract then looking at it as a whole I do not think that there can be any doubt that clauses 19 and 20 were intended to be and should be read as the parties' agreement as to how disputes between them were to be resolved. Buckley LJ's statement in ***Modern Buildings v Limmer & Trinidad*** has to be applied: even if the effect of clauses 3.1 and 3.2 is to import clause 94 (which at this stage I assume) the express terms of clause 19 and 20 displace clause 94. In my view it is particularly relevant that clause 20 dealt with a dispute which might be substantially the same as a dispute under the main contract "which has been submitted to arbitration". Leaving aside the fact that if Cegelec were right about the importation of clause 94 then Cegelec could have secured that such a dispute would be subject to the procedures set out in clause 94, the existence of this provision demonstrates that Cegelec had evidently considered that clause 19 might not give it all the protection that it needed.

28) That approach does not however necessarily dispose of Cegelec's case since clause 19 contains the somewhat ambiguous reference to *"at any time any dispute ..... between the CONTRACTOR and the SUB-CONTRACTOR which cannot be settled amicably"*. These words must refer to a dispute which has not been settled amicably so there is some implicit undertaking to attempt to settle a dispute amicably before a notice of arbitration is given. Does this therefore mean an agreement to obtain a decision and to seek a recommendation from a conciliator? It may be that under a contract such as that between LUL and Cegelec where a dispute has first to be referred to the Engineer then either that procedure in itself or any decision of the Engineer will lead to the dispute being settled amicably whether in anticipation of a decision, or in not risking one, or by accepting the decision, or by negotiating on the basis of the decision. I do not consider that these considerations turn what is essentially an

obligatory contractual mechanism for the initial resolution of disputes to enable work to proceed into what would ordinarily be described as amicable settlement. (The FIDIC Conditions for Civil Engineering Works, 4th ed., 1986, and as revised in 1992, specifically provided for amicable settlement to take place after the Engineer had either decided or failed to decide the dispute, from which it is, not surprisingly, plain that amicable settlement is not the process of seeking a decision from the Engineer.)

29) Cegelec's case was however that the importation of clause 94 had the effect of requiring Pirelli to submit any dispute not to the Engineer under the main contract but to Cegelec itself. In my judgment it is verging on the absurd to think that, as suggested by Cegelec, amicable settlement is represented by a requirement to put a dispute to one of the contracting parties for a decision which if not accepted will become final and binding. The only purpose of such a requirement would be to delay matters for up to three months for a decision need not be given earlier. Whilst there can be value in a *"cooling-off"* period I can see no reason why Pirelli should be taken to have agreed to a period the length of which will be determined by Cegelec. Such a procedure is at the least not conducive to a dispute being settled amicably and is arguably the antithesis of amicable settlement. In any event it conflicts with clause 19 which permits disputes to be referred "at any time" which is consistent with a party deciding when negotiations (the most usual form of amicable settlement) will not achieve their end. In addition there are the odd consequences demonstrated by Mr Elliott, eg that Cegelec would have to give itself notices etc. Mr Ramsey suggested that in practice the decision would be taken by a director of Cegelec or someone else not connected with the dispute. There is nothing in the contract to that effect and such an unusual stipulation certainly could not be read into it.

30) Settling a dispute amicably may also mean a discussion as to how best to settle that particular dispute, perhaps with the assistance of a third party. It might therefore cover conciliation but it does not do so in this instance since conciliation is only available on Cegelec's case after it has taken a decision which either it does not accept (a further absurdity) or which Pirelli does not accept. Moreover under the LUL Conciliation Procedure conciliation could be terminated at any time. To import a conciliation procedure such as the lengthy procedure devised by LUL for use between it and a contractor and to make it applicable lock stock and barrel by means of provisions such as those in clauses 3.1 and 3.2 seems to me to be artificial and so far as removed from reality that it cannot be treated as representing the intentions of Cegelec and Pirelli as what might constitute amicable settlement in clause 19. If that is what was intended it would have been signalled. Therefore I do not consider that the reference in clause 19 to amicable settlement imports the main contract procedures which are not voluntary (which is usually of the essence of amicable settlement) but obligatory.

31) Even on a semantic level I do not consider that clause 3.1 is effective to import clause 94. The main contract is to *"apply to the SUBCONTRACT WORKS as it applies to the Works except where amended by the Sub-Contract"*. In my judgment this means that those provisions of the main contract which are referable to the execution and completion of the sub-contract works are to be applied without the cumbersome need to repeat them. Cegelec is therefore to be placed in a "back-to-back" position as regards the work itself. It is not apt to transpose to the sub-contract level a provision such as clause 94 which has no relevance to any of the Sub-Contractor's obligations in relation to the Works. Judge Hicks QC helpfully described provisions such as those found in clause 94 as *"second-order terms"* as they do not regulate the parties' substantive rights and obligations. In addition as I have already stated clause 19 must be regarded as amending it so that it has no effect as clause 3.1 does not apply to provisions that are amended by the sub-contract.

32) Nor do I consider that clause 3.2 has the meaning suggested by Cegelec. The first reason is that it does not apply where *"the context otherwise requires"*. Clauses 19 and 20 provide that context for they deal with dispute resolution and they set out the parties' intentions. Clause 94 is not therefore to apply to the Sub-contract. If the main contract conditions were to apply indiscriminately then to take one example, it would not have been necessary to have included clauses 8.1 and 8.2 in the sub-contract for in relation to the provisions of the main contract concerning the instructions and decisions of LUL and its Engineer they do exactly what Cegelec maintain is the effect of clause 3.2. Of course instructions and decisions are important so it may be that it was the intention of the parties to spell out the effect of clause 3.2. If so, then clause 94 must be regarded as equally important and therefore clause 3.2 would not result in its automatic transposition. In my judgment the principal reason why clause 3.2 is not and would not have been effective to convert the powers given to LUL and the Engineer under the main contract to ones exercisable by Cegelec lies again in the opening words of clause 3.2: *"unless the context otherwise requires..."*. The nature of a sub-contract such as this obviously provides such a context which would make it inappropriate for such a wholesale transportation. The contract has to be read in its entirety. Clauses 6, 8.1 and 8.2 show that the sub-contract is such that certain key topics fall outside clause 3.2 and have to be treated separately. Dispute resolution is plainly a key topic. Judge Hicks rightly observed that it gives rise to contracts in their own right. In my judgment the context of this subcontract requires that it should be treated separately as indeed it was in clauses 19 and 20. Accordingly I also reject Cegelec's submission that the arbitration procedure in clause 94 applies in modified form. The parties' intention was to have their own individual dispute resolution procedure as set out in clauses 19 and 20 with no fetter on the reference on disputes to arbitration other than the need first to see whether the dispute might possibly be settled amicably - almost certainly primarily by discussion and negotiation.

33) Finally, I reject the proposition that clause 8.2 is to be read as enabling Cegelec to give decisions under clause 94 and thereby requiring Pirelli to submit disputes to Cegelec for decision. This is again a strained and contrived interpretation of the sub-contract. Clause 8 read as whole is plainly concerned with operational instructions and

decisions. Clause 8.1 deals with instructions and decisions of the Employer that may be received directly by Pirelli. If they are not confirmed by Cegelec they are to be recorded in a "Notification of Instruction" form. Clause 8.2 gives Cegelec the same powers to give instructions and decisions as LUL (and by definition the Engineer) has in relation to the main works. So *"instructions and decisions"* here naturally mean the same kinds of instructions and decisions as are referred to in clause 8.1 ie ones that will affect the sub-contract Works. In addition decisions under clause 94 affect Pirelli's rights and obligations under the sub-contract but not (or not necessarily) the sub-contract works. Clause 8.3 then provides that the "instructions and decisions" mentioned in clause 8.1 and 8.2 are such that compliance with them may be valued. Compliance with a decision under clause 94 cannot in any normal sense be the subject of a valuation. Clause 94 does not say that compliance by Cegelec with decisions of the Engineer are to be valued by the Engineer. Cegelec's suggested interpretation of clause 8.2, even if in places sustainable as a matter of language, makes no commercial sense.

34) Accordingly Pirelli is entitled to the orders and declarations sought by its summons.

Mr Vivian Ramsey QC and Mr David Streatfeild-James appeared for the plaintiff, Cegelec, instructed by Masons.